IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1063 of 1997

For Approval and Signature:

HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

RAMESHBHAI TERSING DAMOR

Versus

STATE OF GUJARAT

Appearance:

MS BANNA S DUTTA for Appellant

MR U.R. BHATT, APP for Respondent

CORAM : HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 26/08/2004

ORAL JUDGEMENT (Per : HON'BLE MR.JUSTICE J.M.PANCHAL)

1. Instant appeal filed under Section 374 (2) of the Code of Criminal Procedure, 1973 (" the Code" for short) is directed against judgment dated October 10, 1997 recorded by the learned Additional Sessions Judge, Panchmahals at Godhra, in Sessions Case No.34 of 1997 by which the appellant is convicted of the offences punishable under Section 302 read with 34 IPC as well as Section 323 read with 34 IPC and sentenced to suffer R.I. for life and fine of Rs. 500/- in default R.I. for six months for commission of offence punishable under Section 302 read with 34 IPC as well as RI for six months and fine of Rs.100/- in default R.I. for one month for commission of offence punishable under Section 323 read with 34 IPC. It may be stated that the learned Additional Sessions Judge has directed that substantive sentences imposed on the appellant shall run concurrently.

2. Complainant Nathabhai Galabhai Damor is resident of village Chitava, Taluka Santrampur, District Panchmahals. At the relevant time, he was serving as a Peon in a Bank. He was staying with his wife Ambaben Nathabhai, his cousin Virsinh, his son Rajeshbhai and one Balwantbhai. A machine installed in the house of complainant Nathabhai had become out of order. Therefore, in order to get it repaired, Virsinh, Rajesh and Balwant had called one Abhaysinh of village Taladara at the house of the complainant. Abhaysinh had tried his best to repair the machine, but could not succeed, and as it was getting late, Virsinh, Rajesh and Balwant had accompanied Abhay to ensure his safe passage to his house. After Abhaysinh had reached his village Taladara, all the three who had accompanied him i.e. Virsinh, Rajesh and Balwant were returning to their house situated in village Chitava. While returning to their house, they had to pass nearby field belonging to one Sulubhai. It may be stated that the complainant and his relatives as well as Tersing Damor who is father of the appellant and his relatives belong to one family and had disputes with reference to right to cultivate agricultural lands since long before the incident. When Virsinh, Rajesh and Balwant were passing near the field of Sulubhai, the appellant, his father Tersing Damor, his three brothers i.e., Shanabhai, Gemabhai and Manilal had formed an unlawful assembly, common object of which was to cause death of Virsinh Akhambhai. In order to achieve this common object, the appellant had armed himself with a stick whereas his brother Gemabhai Tersing had armed himself with an axe. It is the case of the prosecution that in prosecution of common object, Tersing Narjibhai

and Manilal Tersing had caught hold of deceased Virsinh Akhambhai and Gemabhai Tersing had inflicted axe blow on elbow of deceased and the appellant had hit the head of the deceased with a stick. Balwant and Rajesh who were with deceased Virsinh were threatened, as a result of which, they had started running towards their house. Rajesh had raised shouts that his uncle Virsinh was being assaulted by the appellant and others. On hearing the shouts, Ambaben, mother of Rajesh, had immediately come out of her house, followed by complainant Nathabhai, who is her husband. Ambaben had attempted to intervene in the incident, but the appellant had inflicted stick blows on her back. On commotion being raised, several persons residing nearby had collected at the place of incident and, therefore, the accused had run away. As Virsinh had sustained serious injuries, Nathabhai had called two members of the panchayat at the place of incident. After their arrival at the place of incident, an arrangement was made to summon a jeep from Santrampur, and in the said jeep, Virsinh was removed to Government dispensary at Fathepura. Ambaben was also treated by Medical Officer of the said Hospital. Thereafter Nathabhai had gone to Fathepura Police Station and lodged his complaint, which was registered by Nanjibhai Kanabhai, who was then PSO of the Police Station. PSO of the Police Station had handed over investigation of the complaint of Nathabhai to Javsingbhai Ramjibhai Pargi, who was then Jamadar at the Khedapa Out Post of Fathepura Police Station. Mr.Pargi had visited the place of incident and drawn panchnama of place of incident. He had also recorded statements of Rajesh and Balwant. As injured Virsinh had sustained serious injuries and his condition was deteriorating, Medical Officer of Government Dispensary, Fathepura, had advised to remove him to Godhra Hospital for better treatment. Accordingly the injured was removed to Godhra General Hospital for treatment where he succumbed to his injuries on December 05, 1995. On necessary information being conveyed, offences punishable under Sections 302, 323, 143, 147, 148, 149, 504 IPC as well as Section 135 of the Bombay Police Act were registered against the appellant and others and investigation into FIR of Nathabhai was made by Pramodbhai Fatesinh Gohil who was then PSI of Fathepura Police Station. The Investigating Officer had drawn panchnama of place of occurrence and recorded statements of those persons who were found conversant with the facts of the case. He had made necessary arrangements for sending dead body of the deceased for postmortem examination. Autopsy on the dead body of the deceased was performed by Dr.Naryanbhai Punjabhai Patel. Three accused i.e. Tersing Narji, Gema Tersing and

Manilal Tersing were arrested on December 6, 1995 whereas appellant i.e. Rameshbhai and his brother Shanabhai could not be arrested as they were absconding. While in police custody, accused Gemabhai Tersing had made disclosure statement, pursuant to which, axe used by him in commission of crime was discovered. The clothes of the deceased were taken into custody by the Investigating Officer. Incriminating articles seized during the course of investigation were sent to Forensic Science Laboratory for analysis. On completion of investigation, charge sheet was submitted by the Investigating Officer against three accused i.e. Tersing Narji, Gema Tersing and Manilal Tersing because appellant i.e. Rameshbhai and his brothers Shanabhai were absconding. The Charge sheet was filed in the court of learned Judicial Magistrate, First Class, Santrampur, for commission of offences punishable under Sections 302, 323, 504,143,147, 148, 149 IPC and Section-135 of the Bombay Police Act, 1951. As the offence punishable under Section 302 IPC is exclusively triable by a Court of Sessions, the case against those three persons was committed to Sessions Court, Panchmahals at Godhra for trial, where it was numbered as Session Case No. 107 of 1996.

3. The appellant was arrested on November 07, 1996. While in custody, the appellant had made disclosure statement, pursuant to which, stick used by him in commission of crime was discovered by Investigating Officer in presence of panch witnesses. On completion of investigation, charge sheet was submitted against him in the Court of learned Judicial Magistrate, First Class, Santrampur, for commission of offence punishable under Sections 302, 323,504, 143, 147, 148, 149, 504 IPC and Section 135 of the Bombay Police Act. As offence punishable under Section 302 is exclusively triable by a Court of Sessions, the case against the appellant was committed to the Sessions Court, Panchmahals at Godhra for trial, where it was numbered as Sessions Case No. 34 of 1997.

4. The learned Additional Sessions Judge, Panchmahals at Godhra to whom the case was made over for trial, framed charge against the appellant at Exh. 1, of the offences punishable under Sections 302, 323, 504, 143, 147, 148,149 IPC and Section 135 of the Bombay Police Act,1951. The charge was read over and explained to the appellant, who pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined (1) Dr. Charel Chimanbhai Bijiabhai as PW-1 at Exh. 12; (2) Dr. Narayanbhai Punjabhai Patel as PW-2 at Exh. 15; (3) Nathabhai Galabhai Damor as PW-3 at 17; (4)

Ambaben Nathabhai as PW-4 at Exh.18; (5) Damor Rajeshbhai Nathabhai as PW-5 at Exh.19; (6) Damor Balwantbhai Rumalbhai as PW-6 a Exh. 20; (7) Sardarbhai Surmabhai, as PW-7 at Exh. 21; (8) Somabhai Akhmabhai as PW-8 at Exh.22; (9) Barjod Kukar as PW-9 at Exh. 26; (10) Vaghijibhai Gautambhai Pargi as PW-10 at Exh. 28; (11) Nanjibhai Dharjibhai as PW-11 at Exh. 34; (12) Nanjibhai Kanabhai as PW-12 at Exh.36; (13) Javsinghbhai Ramjibhai Pargi as PW-13 at Exh.37 and (14) Pramodsinh Fatesinh Gohil as PW-14 at Exh.18, to prove its case against the appellant. The prosecution had also produced documentary evidence such as Inquest Panchnama at Exh.10; postmortem notes of deceased Virsinh at Exh.17; panchnama of place of occurrence prepared by Jamadar Javsingbhai Ramjibhai Pargi at Exh.7; panchnama of place of incident prepared by the Investigating Officer at Exh. 24; panchnama indicating discovery of axe pursuant to the disclosure statement made by accused Gemabhai at Exh.30; panchnama of discovery of stick used in commission of crime by the appellant pursuant to the disclosure statement made by him at Exh.27; injury certificate of Virsinh at Exh. 13; injury certificate of Ambaben Nathabhai at Exh. 14; panchnama indicating seizure of clothes of the deceased at Exh.29; report of analysis at Exh.31; complaint of Nathabhai at Exh.35,etc. in support of its case against the appellant.

5. After recording of evidence of prosecution witnesses was over, the learned Judge explained to the appellant the circumstances appearing against him in the evidence of prosecution witnesses and recorded his further statement as required under Section 313 of the Code. In his further statement, the case of the appellant was that he was innocent and a false case was filed against him. However, he had not examined himself on oath or any other witness in support of the defence pleaded by him in his further statement.

6. On evaluation of evidence led by the prosecution, the learned Judge held that it was proved by the prosecution beyond reasonable doubt that deceased Virsinh had died a homicidal death. According to learned Judge, testimony of (i) Nathabhai Galabhai Damor, (2) Ambaben Nathabhai, (3) Damor Rajeshbhai Nathabhai, (4) Damor Balwantbhai Rumalbhai and (5) Sardarbhai Surmabhai, was reliable, trustworthy as well as cogent, which established that the appellant had delivered fatal blow on head of the deceased by means of a stick. The learned Judge noticed the medical evidence tendered by Narayanbhai Patel, which established that the injury sustained by the deceased on his head was sufficient in

the ordinary course of nature to cause his death. What was deduced by the learned Judge was that it was not proved by the prosecution that the appellant with other accused had formed an unlawful assembly, common object of which was to cause death of deceased Virsinh or cause injury to Ambaben and, therefore, the appellant was not liable to be convicted of the offences punishable under Sections 143, 147, 148 and 149 IPC. In view of this state of affairs, the learned Judge held that the appellant had shared common intention of other accused to cause death of the deceased and had caused death by delivering fatal blow of stick on head of the deceased, as a result of which, he was liable to be convicted of the offence punishable under Section 302 read with 34 IPC. According to the learned Judge it was established by the prosecution that the appellant had caused simple injuries by stick to witness Ambaben Nathabhai and, therefore, the appellant was liable to be convicted of the offence punishable under Section 323 read with 34 IPC. In view of above referredto conclusions, the learned Judge has convicted the appellant of the offence punishable under Section 302 read with 34 and Section 323 read with 34 IPC and imposed sentences referredto earlier by judgment dated October 10, 1997, giving rise to instant Appeal.

7. Ms. Banna Dutta, learned counsel of the appellant contended that the evidence tendered consists of interested witnesses and, therefore, prosecution case should have been disbelieved by the learned Judge of the Trial court more particularly when there was long standing enmity between the complainant and his relatives on one hand and the accused on the other. According to the learned counsel of the appellant, the narration of incident as deposed to by so called eye witnesses materially differs from each other and, therefore, it would not be safe to uphold the conviction of the appellant as recorded by the Trial Court. It was argued that contradictions and/or omissions brought on record discredit the so called witnesses and, therefore, the judgment impugned in the appeal should be set aside. What was maintained by the learned Advocate of the appellant was that a fair reading of evidence of witnesses tendered by prosecution makes it very clear that the prosecution has suppressed genesis of the incident and, therefore, the conviction of the appellant of the offence punishable under Section 302 should be set aside. It was urged that the learned Judge has failed to appreciate evidence on record in its true perspective and, therefore, the appeal should be allowed.

8. Mr. Uday R. Bhatt, learned Additional Public Prosecutor, contended that the rustic village witnesses have tendered evidence before the court in a straight forward manner and, therefore, their evidence should not be viewed with any suspicion by the Court. According to learned counsel of the State Government, the eye witnesses, except Sardarbhai Surmabhai, were closely related to the deceased and as they would not allow the real culprits to go scot-free or involve the appellant in a serious case falsely, their evidence should be accepted by the Court. What was stressed was that sworn testimony of witness Sardarbhai Surmabhai shows that he is an independent person who is neither interested in the complainant or his relatives nor on inimical terms with the appellant and other accused and as commission of offence as claimed by the prosecution is fully established by his evidence, instant appeal should be dismissed. The learned Counsel pointed out that the so called contradictions and/or omissions brought on record are inconsequential and as they do not affect the substratum of the prosecution case, there is no reason to discard otherwise reliable evidence of eye witnesses. According to learned counsel of the State Government, weighty reasons have been assigned by the learned Judge of the Trial Court for convicting the appellant of the offence punishable under Sections 302 read with 34 and Section 323 read with 34 IPC and as the learned Counsel of the appellant has failed to dislodge them, the appeal should be dismissed.

9. This Court has undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and a reasonable probabilities of the case.

10. The fact that deceased Virsinh died a homicidal death can hardly be disputed. It is not argued by the learned counsel of the appellant that prosecution could not establish that deceased had died a homicidal death. The testimony of eye witnesses clinchingly establish that the deceased had received injuries on his head and other parts of body. The injuries sustained by the deceased are mentioned in inquest panchnama produced by the prosecution on record of the case at Exh.10. The testimony of Dr. Naryanbhai Patel, who was Medical Officer of General Hospital, Godhra, shows that he had received dead body of the deceased for postmortem examination on December 6 1995, and that he had performed autopsy on the dead body of the deceased. The Doctor has mentioned in detail the external and internal injuries sustained by the deceased, which were noticed by him

while performing autopsy on the dead body of the deceased. They are to be found in paragraphs 1 and 2 of his deposition. The injury sustained by the deceased are also detailed in postmortem notes produced on the record of the case at Exh.17. The Medical Officer has specifically stated that all the injuries noticed by him on the dead body of the deceased were antemortem and were possible by stick and axe which were produced as muddamal articles before the court. On the facts and in the circumstances of the case, this Court is of the opinion that the finding recorded by the learned Judge of the Trial Court that deceased died a homicidal death is eminently just and is hereby upheld.

11. In order to prove charges levelled against the appellant, the prosecution in all examined 5 eye witnesses. They are (1) Nathabhai Galabhai Damor, PW-3 Exh.17 (2) Ambaben Nathabhai, PW-4, Exh.18, (3) Damor Rajeshbhai Nathabhai, PW-5 Exh.19, (4) Damor Balwantbhai Rumalbhai, PW-6 Exh. 20 and (5) Sardarbhai Surmabhai, PW-7 Exh. 21. Nathabhai Galabhai Damor whose testimony is recorded at Exh.17 has clearly narrated the incident in a simple and straight forward manner. According to him, he was informed by his wife Ambaben that deceased in the company of Rajesh and Balwant had gone to village Taladara along with Abhaysinh to ensure safe passage of Abhaysinh to his house. According to his witness, at about 8.00 p.m. his son Rajesh had come running to the house and was shouting that the deceased was being assaulted by the appellant, his father and brothers. What is maintained by the witness before the court is that thereupon his wife Ambaben had come out of her house and gone to the place where the incident had taken place and that he had followed her. According to this witness, the appellant had caused injury on back of his wife with a stick, but she was saved by him and Surji Veljibhai, Raising Gamjibhai and Arjanbhai Khushalbhai. It is mentioned by the witness that thereafter he had found that over and above the appellant, four others i.e. Tersing, Manilal Tersing, Gema Tersing and Shanabhai Tersing were hurling abuses and telling that they were determined to kill those who were inclined to enjoy the disputed fields. What is mentioned by the witness is that Gemabhai Tersing was armed with an axe, whereas the appellant was armed with a stick, and when he had gone near the place of incident, he had found that Virsinh was lying on the ground. It is also mentioned by the witness that on arrival of other persons of village at the place of incident, the appellant and others had run away. According to this witness, he had taken injured Virsinh and his injured wife to Fathepura Government Dispensary

in the jeep which was summoned from Santrampur and had thereafter lodged complaint. It is also mentioned by the witness that the Doctor on duty at Government Dispensary, Fathepura, had advised to remove Virsinh to General Hospital, Godhra, for treatment and accordingly Virsinh was removed to the said hospital and during the course of treatment, deceased had succumbed to his injuries on December 5, 1995 and that postmortem on his dead body was performed on December 6, 1995.

In his cross-examination, it is mentioned by the witness that for the purpose of informing Abhaysinh who was residing at village Taladara that machine installed in the house of the appellant was damaged, Virsinh had gone to village Taladara. In the cross-examination, it was further stated by the witness that he had returned home at about 6.00 p.m. after performing his duties and that there was darkness, as it was month of December. According to him, when he had returned home, repairing work of machine was going on, but as Abhaysinh was not able to repair the same, the work of repairing was left incomplete and deceased in the company of Rajesh and Balwant had gone to village Taladara in order to ensure safe passage of Abhaysinh to his house. In his cross-examination, it was further mentioned by him that when his son Rajesh had come to inform that the appellant and others were assaulting the deceased, at that time, he was panting and was scared. A damaging suggestion was made by the defence that Rajesh who is son of this witness had informed him that all were beating Virsinh and, therefore, he in the company of his wife had gone to the place of incident and this suggestion was readily accepted by the witness. It was also admitted by him that he had not informed the Medical Officer of Fathepura that deceased and his wife were assaulted by the appellant and others. What was maintained by the witness in his cross-examination was that he had given names of all the five persons, who had participated in the crime in question but Jamadar of the Police Station had informed him that there was a rule to register complaint only against four persons and, therefore, name of the fifth person was not included in the complaint. The witness has stated before the court that in view of this assertion made by Jamadar, he had given names of four accused. Other suggestions were also made to this witness which were denied by him, but it is not necessary to refer to them in detail because they are inconsequential.

12. Similar is the evidence tendered by eye witness Ambaben Nathabhai Exh.18, Damor Rajeshbhai Nathabhai

Exh.19 and Damor Balwantbhai Rumalbhai Exh.20. All the eye witnesses have corroborated each other in material particulars. Witness Nathabhai is also corroborated by contents of his First Information Report which was lodged promptly without loss of time. Further, the testimony of eye witnesses also gets complete corroboration from medical evidence on record. The learned Judge of the Trial Court, who has advantage of observing demeanour of the witnesses, has placed reliance on their testimony as the same was found to be inspiring one. Though the learned counsel of the appellant has brought to the notice of this Court certain contradictions and/or omissions appearing in the evidence of witness Ambaben Nathabhai, witness Rajesh and witness Balwant, it is not necessary to refer to them in detail inasmuch as they do not affect the substratum of the prosecution case at all. The learned Judge has discussed their evidence in detail which is quite evident from the judgment impugned in the appeal and, therefore, this court feels that it is not necessary to reproduce the examination-in-chief as well as cross-examination of witness Ambaben, witness Rajesh and witness Balwantbhai and to burden unnecessarily the judgment. Suffice it to say that this Court has gone through the testimony of all the above named eye witnesses carefully, and nothing could be brought to the notice of the court by the learned counsel of the appellant which would raise doubt about their claim that the appellant had inflicted fatal blow on the head of the deceased with a stick. At this stage it is worth noticing that sworn reliable testimony of witness Ambaben regarding her injuries gets absolute corroboration from testimony of Dr.Charel examined at Exh.12 and certificate of her injuries produced on record at Exh. 14. As it is proved that witness Ambaben had sustained injuries, her presence at the place and time of incident can hardly be doubted. Therefore there should not be any difficulty at all in accepting her evidence. Her evidence clearly establishes that injuries on her were caused by the appellant whereas injuries on the deceased were caused by the appellant and his brother Gemabhai. Therefore conviction of the appellant under Section 323 read with 34 IPC is well founded and not liable to be disturbed. The plea that the above named eye witnesses including complainant Nathabhai are interested witnesses and, therefore, their evidence should be discarded, is merely stated to be rejected. It is well to remember that the complainant and the deceased who was his cousin were staying together when the incident had taken place. The complainant and others who all close relatives of the deceased, would never allow the real culprits to go scot-free and involve falsely the appellant and others in

a serious case. The testimony of eye witnesses gets ample corroboration from medical evidence on record. In a given case, the court may seek corroboration to the testimony of interested witnesses. However, so far as this case is concerned, the court finds that the testimony of close relatives of the deceased is free from exaggerations and/or embellishments and does not suffer from serious infirmities. Under the circumstances, this court is of the firm opinion that the finding recorded by the leaned Judge that the appellant had delivered fatal blow on the head of the deceased with a stick and caused his death deserves to be confirmed on the strength of sworn reliable testimony of above named witnesses.

13. Though this court has decided not to discuss testimony of witness Ambaben, witness Rajeshbhai and witness Balwantbhai in detail, it is proposed to discuss the evidence tendered by witness Sardarbhai Surmabhai because the record shows that he is an independent eye witness and is neither interested in Nathabhai or his relatives nor on inimical terms with the appellant and other accused. The evidence of this witness is recorded at Exh.21. This witness has stated that he was residing in a building belonging to his uncle, situated in village Chitva, and that he was knowing the deceased as well as the appellant and others. His evidence shows that his house is situated in the field in which the incident had taken place. According to him, on the day of the incident, he was resting on a cot and had come out of his house on hearing shouts. What is maintained by the witness before the court is that on coming out from his house, he had found that Tersing and his son Manilal had caught hold of the deceased whereas Gema Tersing and Ramesh Tersing were beating the deceased. It is specifically mentioned by the witness that Rameshbhai Tersing i.e. appellant had caused injury on the head of the deceased with a stick whereas Gemabhai Tersing had caused injury on ankle of the deceased by means of an axe. It was also mentioned by the witness that Virsinh was at that time accompanied by Balwant and Rajeshbhai. It is further mentioned by the witness that Ambaben was coming towards the place of incident but in order to prevent her from doing so, the appellant had delivered stick blow on her back whereas Balwant and Rajesh were threatened, as a result of which, they were scared and had run away. It is mentioned by the witness that he was not knowing as to why Virsinh was murdered. He had identified stick and axe used in commission of crime which were produced by the prosecution as muddamal articles before the court.

In his cross-examination, it was mentioned by the witness that the house in which he was staying was situated in the field. According to him, he had not gone to the place of incident immediately and had gone when other people of village had arrived. According to him, he had not raised shouts. Surprisingly a damaging suggestion was made to this witness that Virsinh had raised shouts that he should be saved as he was being killed and this suggestion was accepted by the witness. It was also admitted by the witness in his cross-examination that though he had heard shouts of Virsinh, he had not gone to his rescue. According to him on the day of incident, he had not talked about the incident with his uncle because his uncle was not present in the village and had come to village on the next day. It was also admitted by the witness that he had apprehended that his uncle and he himself would land into difficulties because the incident in question had taken place in his field. The suggestion made by the defence that Gemabhai Tersing had not caused any blow on the deceased was emphatically denied by him. It was also denied by the witness that he had not come out of his house and not witnessed the incident. This is all what transpired from the testimony of this witness. On reassessment of the evidence of this witness, it is evident that he is an independent person and not interested in any one. The narration of incident by him is simple and inspires confidence of this court. No major contradictions and/or omissions have been brought on record by the defence which would create any doubt about the version of incident narrated by him in his examination-in-chief. The witness not only gets corroboration from other eye witnesses who are close relatives of the deceased, but also gets corroboration from medical evidence on record. No cogent reason could be pointed out by the learned Advocate of the appellant as to on what ground the testimony of this independent witness should be discarded by the court. Having regard to the totality of the facts and circumstances as emerging from the record of the case, this Court is of the firm opinion that commission of offences punishable under Section 302 read with 34 and 323 read with 34 IPC by the appellant as claimed by the prosecution stands fully and satisfactorily established by the reliable testimony of witness Sardarbhai Surmabhai as well as other eye witnesses.

14. The testimony of Dr. Naryanbhai Patel would show that the injury caused on the head of the deceased was sufficient in the ordinary course of nature to cause his death. It is relevant to notice that first of all, the

deceased was assaulted by Gemabhai Tersing with an axe and thereafter the appellant had delivered a fatal blow on the head of the deceased with great force. The blow was given with such a great force that there was fracture on right parietal bone of skull, as a result of which, intracranial haemorrhage had taken place. The medical evidence would show that fracture on right parietal bone was linear in nature and was extending from middle of skull to left ear. There is no manner of doubt that grave injury was caused by the appellant on the head of the deceased which had proved fatal. It is well to remember that the deceased was totally unarmed and had offered no provocation to any one worth the name. It is nobody's case that the injury inflicted by the appellant on the head of the deceased was accidental in the sense that the blow was aimed on some other part of his body and because of supervening event, like sudden intervention of someone or movement of the deceased, the lathi had struck on the head of the deceased. There is no manner of doubt that it was the intention of the appellant to cause that very injury which was ultimately found by the Medical Officer while performing autopsy on the dead body of the deceased. The medical evidence clinchingly establishes that the injury sustained by the deceased was sufficient in the ordinary course of nature to cause his death and, therefore, the conviction of the appellant under Section 302 read with 34 IPC cannot be regarded as erroneous. When an injury is not found to be accidental and is caused on vital part of body with a great force which results into fracture of parietal bone and the injury is found to be sufficient in the ordinary course of nature to cause death of the injured, the offence would be one under Section 302 IPC and not one under Section 304 IPC. The testimony of the witnesses and more particularly that of Rajeshbhai Nathabhai and Balwantbhai Rumalbhai would show that the appellant as well as his brothers and father were waiting for the deceased to return. The appellant had armed himself with a stick whereas Gemabhai Tersing had armed himself with an axe. They had mounted attack on the deceased jointly and scared away Rajesh as well as Balwant. Further, they had prevented Ambaben from intervening in the incident when an attempt was made by her to save the deceased. Having regard to all these relevant facts and circumstances, there is no manner of doubt that the common intention of the appellant and Gemabhai was to cause death of the deceased and cause injury to a person who was intending to save the deceased. Thus, the evidence clinchingly establishes that the appellant had shared the intention of Gemabhai. Therefore, invocation of Section 34 IPC cannot be regarded as illegal.

15. The net result of above discussion is that this Court does not find that the conviction of the appellant of the offence punishable under Section 302 read with 34 or 323 read with 34 is in any manner erroneous. No ground is made out by the learned Counsel of the appellant to interfere that the impugned judgment and, therefore, the appeal which lacks merits is liable to be dismissed.

16. For the foregoing reasons, the appeal fails and is dismissed. Mudammal to be disposed of in terms of directions given by the learned Judge in the impugned judgment.

(J.M. Panchal, J.)

(J.R. Vora, J.)

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